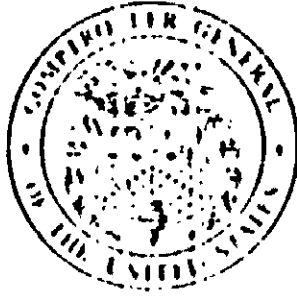


DECISION



D. Agapian
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548
P147
77/6

FILE: B-191413

DATE: September 19, 1978

MATTER OF: Patrick J. Fleming - Retroactive Compensation

DIGEST: Employee claims that assignment of higher level duties resulted in his performing work substantially equal to that of a higher grade position. Where claimant has not established that he was officially detailed to a higher grade position the general rule applies that an employee is entitled only to the salary of the position to which he has been appointed regardless of the duties he may perform. Accordingly, prior decision denying claim for backpay is sustained. See Comp. Gen. decs. and court cases cited.

This decision is in response to a request by Mr. Patrick J. Fleming, an employee of the Department of Energy, that we reconsider our prior decision Matter of Patrick J. Fleming, B-191413, May 22, 1978, in which we held that Mr. Fleming was not entitled to a retroactive temporary promotion and backpay for the period April 6, 1977, to November 30, 1977. Mr. Fleming contends that during the period in question he was performing the higher level duties of a Project Coordinator grade GS-12 although he was only officially appointed as a Compliance Specialist grade GS-11.

The claimant states that while he was employed as a grade GS-11 Investigator with the Federal Energy Administration (FEA) area office in Edina, Minnesota, he had applied for a position as an Assistant Project Coordinator GS-11 in Washington, D.C., under FEA Vacancy Announcement No. 76-437, issued July 7, 1976. By letter of November 4, 1976, Mr. Fleming was advised that he had been accepted for a reassignment in Washington as a Compliance Specialist grade GS-11. An SF-50, Notification of Personnel Action, dated December 20, 1976, shows that effective December 19, 1976, Mr. Fleming was reassigned to a grade GS-11, Compliance Specialist position in Washington, D.C. Although he was officially assigned to a grade GS-11 Compliance Specialist position, Mr. Fleming contends that from April 6, 1977, to November 30, 1977, he performed work substantially equal to that of a Project Coordinator, grade GS-12.

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In our prior decision of May 22, 1978, we noted that our Office has held that employees who are detailed to higher grade positions for more than 120 days without Civil Service Commission approval are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. Matter of Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977). However, we held that our decision in Turner-Caldwell was inapplicable to Mr. Fleming's situation as the record did not establish that Mr. Fleming was officially detailed to a higher level position. Our determination in Turner-Caldwell applies only where the employee has been officially detailed to another established, higher grade position and does not apply where the employee's position has merely undergone an accretion of other duties. Matter of Patrick L. Peters, B-189663, November 23, 1977.

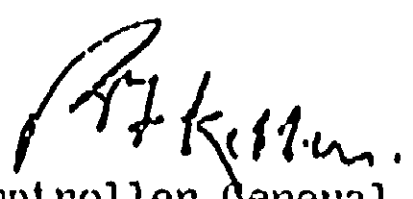
Following our earlier determination, Mr. Fleming provided our Office with additional information and documentation. However, none of this additional information establishes that he had been officially detailed to a higher grade position. Additionally, we note that Mr. Fleming has not contended that he was officially detailed to a higher grade position.

We have also recently been advised by Mr. John A. Carlyle, who was manager of the "Crude Oil Branch" in which Mr. Fleming was employed, that, in his opinion, Mr. Fleming's duties included assignments equal in difficulty to that of a grade GS-12 Project Coordinator. Mr. Carlyle stated that he had assigned Mr. Fleming some higher level work projects due to his erroneous belief that Mr. Fleming was in a Project Coordinator grade GS-11 position which, unlike the Compliance Specialist position, was a career-ladder position and that he assigned Mr. Fleming more difficult cases as part of the normal development of an employee. However, Mr. Carlyle informed us that he did not view the assignment of increasingly difficult work to Mr. Fleming as a detail but as an accretion of duties in anticipation of Mr. Fleming's being promoted. Since none of the additional information presented shows that Mr. Fleming was officially detailed to a higher grade position, the claimant has not sustained the burden of proof required to justify an award of backpay under our determination in Turner-Caldwell, *supra*. See also Matter of Nathan Lesowitz, B-185766, June 15, 1977.

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In our prior decision we held that Mr. Fleming was not entitled to backpay because the general rule in cases involving an accretion of duties is that an employee is entitled only to the salary of the position to which he has been appointed regardless of the duties he may perform. See Dianish v. United States, 183 Ct. Cl. 702 (1968); Coleman v. United States, 100 Ct. Cl. 41 (1943); and Patrick L. Peters, supra. An employee who is performing duties of a grade level higher than that of the position to which he is appointed is not entitled to the salary of the higher level position unless and until the position is classified to the higher grade and he is promoted to it. Matter of Marion McCaleb, 55 Comp. Gen. 515 (1975). We note that even if a position were reclassified to a higher level and the employee was promoted, the higher salary rate would not be retroactively effective. In United States v. Testan, 424 U.S. 392 (1976), the United States Supreme Court held that neither the Classification Act, 5 U.S.C. 5101-5115 (1976) nor the Back Pay Act, 5 U.S.C. 5596 (1976), creates a substantive right to backpay for periods of a wrongful classification action.

In view of the fact that Mr. Fleming has not established that he was detailed to a higher grade position and since the general rule is that an employee is entitled only to the salary of the position to which he has been appointed, our prior decision denying Mr. Fleming's claim for backpay is sustained.


Deputy Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

D. Agazarian
PLM II

B-191413

September 19, 1978

The Honorable Newton I. Steers, Jr.
House of Representatives

Dear Mr. Steers:

We refer again to your letter dated June 26, 1978, on behalf of your constituent, Mr. Patrick J. Fleming, who has requested a temporary retroactive promotion and accompanying backpay for the period of an alleged detail to a higher grade position.

In your letter of June 26, 1978, you requested that Mr. Fleming and Mr. John Carlyle be contacted in connection with the above claim. An informal meeting was held on July 19, 1978, between Mr. Fleming and Mr. David Agazarian, an attorney in our Office of General Counsel, in which Mr. Fleming presented his views regarding his claim along with additional documentation. Mr. Carlyle, who was unable to attend the meeting, advised our Office in a telephone conversation with Mr. Agazarian of his knowledge of the circumstances of Mr. Fleming's employment during the period for which backpay is claimed.

We have carefully reviewed the information provided by Messrs. Fleming and Carlyle and have again reviewed the record upon which our prior determination was based. Neither the new information nor the earlier record indicates that Mr. Fleming was ever officially detailed to a higher grade position. In the absence of such a detail the general rule is that an employee is entitled only to the salary of the position to which he has been appointed regardless of the duties he may perform. Accordingly, by decision B-191413 of today, copy enclosed, we have sustained our prior decision denying Mr. Fleming's claim.

Sincerely yours,

R. F. K. Miller

Deputy Comptroller General
of the United States

Enclosure